(5)

No. 89-61

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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37 pp

QUESTION PRESENTED

Whether tape recordings of conversations obtained pursuant to court-authorized electronic surveillance should be suppressed because of a delay in the judicial sealing of the tapes, even if the tapes that are offered into evidence are proved to be the unaltered originals.

PARTIES TO THE PROCEEDING

In addition to the named parties, Hilton E. Fernandez Diamante, Jorge A. Farinacci Garcia, Elias S. Castro Ramos, Orlando Gonzalez Claudio, Isaac Camacho Negron, Ivonne Melendez Carrion, Angel Diaz Ruiz, and Luis A. Colon Osorio are respondents.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 875 F.2d 17. The opinion of the district court suppressing evidence (Pet. App. 17a-96a) is reported at 695 F. Supp. 649. The opinion of the district court on the government's motion for reconsideration (Pet. App. 15a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1989. On June 26, 1989, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 14, 1989, and the petition was filed on that day. It was granted on October 10, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2515 provides:

> **Prohibition of use as evidence of intercepted wire or oral communications.**
>
> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2518 (1982 & Supp. V 1987) provides in relevant part:

> **Procedure for interception of wire, oral, or electronic communications**
>
> * * * * *
>
> (8)(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be

> kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.
>
> (b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.
>
> (c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.
>
> * * * * *
>
> (10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * * *

STATEMENT

A 17-count indictment returned in the United States District Court for the District of Connecticut charged respondents and ten others with offenses pertaining to the September 12, 1983, robbery of the Wells Fargo depot in West Hartford, Connecticut, during which approximately $7 million was taken.[1] Evidence connecting respondents to that robbery was discovered during an investigation of their involvement in a rocket attack on the United States Courthouse in Hato Rey, Puerto Rico. The targets of the investigation, including respondents, were members of a Puerto Rican organizaton known as "Los Macheteros," the "machete wielders." During the investigation, court-authorized electronic surveillance was conducted at six different locations between April 1984 and August 1985.[2]

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[1] Respondents and their co-defendants were charged with bank robbery, in violation of 18 U.S.C. 2113(a); aggravated bank robbery, in violation of 18 U.S.C. 2113(d); theft from an interstate shipment, in violation of 18 U.S.C. 659; interstate and foreign transportation of stolen money, in violation of 18 U.S.C. 2314; interference with commerce by robbery, in violation of 18 U.S.C. 1951; and conspiracy, in violation of 18 U.S.C. 371 and 1951. Of the ten co-defendants who are not respondents in this case, two have pleaded guilty to charges arising out of the indictment, four have been convicted after a jury trial, and one has been acquitted. Three of the ten remain fugitives.

[2] In addition to the interceptions described below, electronic surveillance was conducted at the residence of two co-defendants in Santurce, Puerto Rico, and at a condominium in Hato Rey, Puerto Rico, that was used by the conspirators. Pet. App. 20a-21a. The district court did not suppress the tape-recorded conversations obtained as a result of those interceptions, *id.* at 79a, 94a, and the admissibility of that evidence is therefore not at issue here.

Following the return of the indictment in this case, respondents moved to suppress all the evidence obtained as a result of electronic surveillance. Pet. App. 17a-96a; Gov't C.A. Br. 4-5.

After an eight-month suppression hearing,[3] the district court granted the motion to suppress with respect to conversations recorded at two locations; the court denied the motion in all other respects. Pet. App. 17a-96a; Gov't C.A. Br. 3. The government appealed, and the court of appeals affirmed. Pet. App. 1a-14a.

1. On April 27, 1984, Chief Judge Perez-Gimenez of the United States District Court for the District of Puerto Rico entered an order under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521 (Title III), authorizing the FBI to intercept oral communications at the apartment of respondent Filiberto Ojeda Rios in Levittown, Puerto Rico. Ojeda Rios, who had no home telephone, was known to use three public telephones across the street from his apartment. Accordingly, the judge also authorized the interception of wire communications at those telephones. On May 11, 1984, Judge Perez-Gimenez also authorized the placement of a microphone in respondent Ojeda Rios's automobile, a Datsun Sentra. The orders for the car and for the Levit-

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[3] The court heard testimony from 20 FBI agents who monitored the recorded conversations, from FBI agents who were involved in presenting the tapes for judicial sealing, from the FBI electronic surveillance clerk who maintained custody of the tapes after interception, from the Department of Justice attorneys who supervised the electronic surveillance investigation, and from defense and government experts who addressed the issue of the authenticity of the tapes. Pet. App. 17a.

town apartment and the public telephones were extended on several occasions. Pet. App. 18a-21a.

In July 1984, suspecting that his conversations in Levittown were being intercepted, Ojeda Rios moved from ~~Levittown~~ to El Cortijo, Puerto Rico. In light of that move, the FBI ceased monitoring at Levittown on July 9, 1984, although the final extension for the Levittown apartment and telephones did not expire until July 23, 1984. On July 27, the government received authorization to intercept the telephones and to place a microphone in respondent Ojeda Rios's new residence in El Cortijo. That order was extended several times, as was the order permitting the interception of conversations in Ojeda Rios's Datsun Sentra. The final extension for the El Cortijo order expired on September 24, 1984. Pet. App. 72a-73a, 75a. The final extension for the surveillance of Ojeda Rios's Datsun expired on October 10, 1984. The Levittown, El Cortijo, and Datsun tapes were judicially sealed on October 13, 1984. Pet. App. 19a-21a, 69a n. 8, 73a; Gov't C.A. Br. 7 & n.5.

On November 1, 1984, the court authorized the FBI to intercept conversations at the Vega Baja, Puerto Rico, residence of defendants Juan Segarra Palmer and Luz Berrios Berrios. The court extended that authorization order each month for seven months; the last extension expired on May 30, 1985. On January 18, 1985, the court also authorized the FBI to intercept conversations at two public telephones near the Vega Baja residence. That order expired on February 17, 1985, and the FBI therefore temporarily ceased intercepting conversations as of that date. Because the government wished to revise the affidavit that was being used to support the requests for electronic surveillance authorization, the government did not apply for an extension of the January order until March 1, 1985.[4]

[4] The revisions turned out to take longer than expected, so that the affidavit used with the March extension application was substantially the same as the affidavit that had been used in prior applications. The revised affidavit was used the following month. Pet. App. 14a, 79a-80a.

The new order issued on that date. After two more extensions, the final Vega Baja intercept order expired on May 30, 1985. The tapes of all conversations recorded at the Vega Baja residence and the nearby public telephones were judicially sealed on June 15, 1985. Pet. App. 21a, 79a-80a; Gov't C.A. Br. 9-10.[5]

2. In their motions to suppress all the conversations intercepted during the investigation, respondents alleged that the tapes were inadmissible because they had not been sealed "immediately" upon the expiration of the intercept orders and extensions, as required by 18 U.S.C. 2518(8)(a). Pet. App. 17a. During the suppression hearing, respondents also sought to show that the tapes had been altered. The government offered expert evidence to rebut those claims, and it made a detailed showing of the measures that had been taken to preserve the integrity of the tapes. *Id.* at 23a-24a, 31a-35a, 51a-53a. With respect to the judicial sealing requirement, the government showed that Frank Bove, the supervising attorney who was responsible for having many of the tapes sealed, was aware of the statutory sealing requirement, but interpreted the statutory language to mean that the sealing obligation did not arise until all related intercept orders and their extensions had expired. *Id.* at 76a-77a. Accordingly, Bove had arranged for Judge Perez-Gimenez to seal the related Levittown, El Cortijo, and Datsun tapes on October 11 and 13, 1984, at the time of the expiration of the last of the intercept orders for those locations. *Id.* at 35a-36a, 62a.

[5] The two-week delay in sealing the Vega Baja tapes arose from a misunderstanding between the responsible officials in the FBI and the prosecutor about who was to take responsibility for initiating the sealing process. Pet. App. 84a-87a.

Bove arranged for the sealing of the tapes from the Vega Baja intercepts at the end of May 1985, following the end of the last extension of the intercept authorization for that location. *Id.* at 79a, 85a-86a.

3. At the conclusion of the suppression hearing, the district court admitted some of the tapes of intercepted conversations and excluded others. With respect to the challenge to the integrity of the tapes, the district court credited the testimony of the government's expert and found that the government had proved by clear and convincing evidence that the tapes being admitted into evidence were in their original form and had not been tampered with. Pet. App. 55a-61a.

Turning to the issue of the delays in the judicial sealing of the tapes, the court first considered the sealing of the Levittown tapes. The government contended that the El Cortijo order was an extension of the Levittown order because the El Cortijo order simply followed the movement of the target, respondent Ojeda Rios. If that was so, the government argued, the sealing obligation for the Levittown tapes did not ripen until September 24, 1984, when the final El Cortijo extension expired. Pet. App. 67a-70a.

The district court rejected that argument. It held instead that the obligation to seal the tapes from the oral and wire interceptions at Levittown arose no later than July 23, 1984, when the final extension of the original Levittown order expired.[6] Based on that analysis, the district court concluded that there had been at least an 82-day delay in sealing the Levittown tapes, from July 23 to October 13. *Id.* at 63a-65a. The court found that delay to be "excessive

[6] Although the interception at Levittown was discontinued several days before the Levittown intercept order expired, the court found it unnecessary to decide which event triggered the obligation to have the court seal the tapes. Pet. App. 63a-66a.

as a matter of law" and held that it required the automatic suppression of all the Levittown tapes. The court thus found it irrelevant whether the government could prove that those tapes had not been altered, *i.e.*, that the delay in sealing did not affect the integrity of the tapes. *Id.* at 66a. The court accordingly noted that because it was suppressing the Levittown tapes, it would not address the question whether the integrity of those tapes had been maintained. *Id.* at 30a n.3.

The district court refused to suppress the El Cortijo tapes, although there was a 19-day delay in sealing those tapes. Unlike the delay in sealing the Levittown tapes, the court concluded that the 19-day delay in sealing the El Cortijo tapes was not "so great as to require automatic exclusion." Pet. App. 76a. The court then found that the government had provided a satisfactory explanation for the 19-day delay. The court first noted that the government had proved by clear and convincing evidence "the immaculacy of the tapes." *Id.* at 75a. Moreover, the district court found that the sealing delay "came about in good faith": it did not prejudice the defendants in any way, and the government "derived no benefit from its failure to seal immediately." *Id.* at 76a. Finally, the court concluded that the sole cause of the delay was attorney Bove's misunderstanding of the statutory sealing requirement, and that Bove acted promptly to have the tapes sealed after the expiration of the Datsun Sentra extension order on October 10, 1984, which was the date that Bove believed triggered the sealing requirement. Pet. App. 76a-79a.

The court next considered the Vega Baja public telephone tapes; it held that the obligation to seal the tapes made pursuant to the initial intercept order ripened on February 17, 1985, when that order expired. The court

acknowledged that the initial order was extended several times, but it held that the extensions could not postpone the sealing obligation unless the government provided a "satisfactory explanation" for the 12-day hiatus between the expiration of the original order and the first extension. The government explained that it had been attempting to revise the underlying affidavit on which the Vega Baja applications were based, but the court found that explanation unsatisfactory. Pet. App. 82a-83a. Accordingly, the court calculated that 118 days had passed between the expiration of the original intercept order on February 17, and June 15, when all the Vega Baja tapes were sealed. The court held that this delay, like the delay in sealing the Levittown tapes, was "excessive as a matter of law," and it suppressed the Vega Baja public telephones tapes that had been obtained pursuant to the January 18 order. *Id.* at 83a.

The court did not suppress the remaining Vega Baja tapes, despite the 16-day delay (from May 30 to June 15) in sealing those tapes. The court reasoned that suppression of those tapes was not required because the government had proved by clear and convincing evidence that the tapes had not been altered and because respondents were not prejudiced by the delay, which was the result of a good faith misunderstanding between the prosecutor and the FBI as to who would initiate the sealing process. Pet. App. 84a-88a. The court specifically found that the government had not used the 16-day delay "to tamper with the tapes or in any way use the tapes to gain some advantage." *Id.* at 84a.

4. The government appealed the suppression of the 455 Levittown tapes and the 34 Vega Baja public telephone tapes that were recorded pursuant to the January 18, 1985, intercept order. The court of appeals affirmed. Pet. App. 1a-14a. The court observed that when tapes are not sealed within one or two days after the expiration of a

wiretap order, the government bears the burden of offering a satisfactory explanation for the delay as a prerequisite to the tapes' admissibility. *Id.* at 7a. The court disagreed with those circuits that "excuse sealing delays simply upon proof of the integrity of the tapes." *Id.* at 8a.[7]

The court of appeals agreed with the district court's conclusion that there had been a delay of at least 82 days in sealing the Levittown tapes. Pet. App. 11a. Although it did not agree with the district court's conclusion that the tapes should be suppressed "on the basis of time alone," *id.* at 11a-12a, the court nevertheless concluded that suppression was required. In light of the length of the delays in sealing, the court found that the government's explanation was not "satisfactory," because it "resulted from a disregard of the sensitive nature of the activities undertaken." *Id.* at 12a.[8]

With respect to the Vega Baja public telephone tapes, the court of appeals agreed with the district court that the government was required to provide a "satisfactory explanation" for the 12-day hiatus between the expiration of the January 18 order on February 17, 1985, and the issu-

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[7] The court cited cases from the Third, Fifth, Seventh, and Eighth Circuits as adopting the approach it rejected: *United States* v. *Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); *United States* v. *Diadone*, 558 F.2d 775, 780 (5th Cir. 1977), cert. denied, 434 U.S. 1064 (1978); *United States* v. *Cohen*, 530 F.2d 43, 46 (5th Cir.), cert. denied, 429 U.S. 855 (1976); *United States* v. *Angelini*, 565 F.2d 469, 471 (7th Cir. 1977), cert. denied, 435 U.S. 923 (1978); *United States* v. *Lawson*, 545 F.2d 557, 564 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *McMillan* v. *United States*, 558 F.2d 877, 879 (8th Cir. 1977).

[8] Although the court agreed that the same mistaken interpretation of law that led to the delay in sealing the Levittown tapes "might help to excuse the nineteen-day delay [found] accept[able] by Judge Clarie in respect to the later El Cortijo tapes," it imposed a higher standard for the longer delay. Pet. App. 13a.

ance of the March 1 extension order. The court of appeals also agreed with the district court that the government's explanation for that delay was insufficient. Pet. App. 14a. The court therefore treated the January 18 order as if it had never been extended, so that the tapes obtained pursuant to the January 18 order should have been sealed shortly after February 17, rather than in June, after the expiration of the final Vega Baja intercept order. The court of appeals thus agreed with the district court that there had been a 118-day delay in sealing the tapes recorded pursuant to the first Vega Baja telephone intercept order. Because it found that delay unjustified, the court agreed with the district court that the products of the January 18 order had to be suppressed. *Ibid.*

SUMMARY OF ARGUMENT

1. Section 2518(8)(a) of the federal wiretap statute requires that immediately after the expiration of an order authorizing electronic surveillance, recordings of any intercepted conversations must be presented to the judge who issued the order and sealed under his direction. The statute further provides that the presence of such a seal, or a satisfactory explanation for its absence, is a prerequisite for the use of the recordings in evidence. The question in this case is whether Section 2518(8)(a) bars the use of evidence which was sealed by the court, but in which the sealing was not done "immediately" after the expiration of the electronic surveillance orders.

Section 2518(8)(a) bars the admission of evidence only in cases in which a judicial seal is absent; it does not require the exclusion of tapes when the tapes are sealed but the sealing was delayed. The plain language of Section 2518(8)(a) supports our construction: the statute requires a "satisfactory explanation" for the "absence" of the required seal, not for a delay in affixing it. Nor is there anything in the legislative history or context of Section 2518(8)(a) suggesting that suppression should be ordered in the case of a delay in sealing. The fact that Section 2518(8)(a) does not provide a remedy for delays in sealing does not, of course, mean that tape-recorded evidence must be admitted regardless of its trustworthiness. Quite apart from any remedies provided by Title III, the courts possess ample authority to police the admission of evidence whose authenticity is challenged.

2. Even if Section 2518(8)(a) is interpreted to require a "satisfactory explanation" for sealing delays, that term should be construed, consistent with the purpose of Section 2518(8)(a), to mean an explanation that satisfies the court that the tape-recorded evidence has not been tampered with. In accordance with that approach, most courts have held that late-sealed tapes are admissible if the government can demonstrate that the tapes have not been altered. There is no justification under the language or policy of the statute to exclude evidence because the delay was lengthy or because it resulted from some lapse on the part of the government. Neither factor has any significant bearing on the essential matter to be established by the explanation: the integrity of the tapes. Suppression also cannot be justified because of the possible deterrent effect of the suppression order. If the tapes are shown to be authentic, it would be inconsistent with the purposes of Section 2518(8)(a) to suppress them simply because suppression might affect the government's conduct in future cases. In any event, the government already has strong incentives to comply with the sealing requirement in order to avoid or minimize the burden of lengthy suppression hearings necessary to establish the integrity of the tapes when sealing has been delayed.

3. Even if the government is required to provide a "satisfactory explanation" for sealing delays, and even if the reasons for the delay in sealing or the length of the delay are relevant considerations, the explanation for the delays in this case was still "satisfactory." All the delays at issue here resulted from the supervising attorney's good faith and objectively reasonable interpretation of the statutory requirement permitting sealing after "extensions" of the original intercept order. Accordingly, if the government can establish that the tape-recorded evidence in this case is authentic, then the evidence should be admitted.

ARGUMENT

I. TITLE III DOES NOT REQUIRE SUPPRESSION OF TAPE-RECORDED EVIDENCE BECAUSE OF A DELAY IN SEALING THE TAPES

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521, establishes specific procedures for conducting electronic surveillance of oral and wire communications. Among those procedures is the requirement that recordings of intercepted conversations be sealed under the direction of a judge "[i]mmediately upon the expiration of the period of the [electronic surveillance] order, or extensions thereof." 18 U.S.C. 2518(8)(a). The presence of a seal, "or a satisfactory explanation for the absence thereof," is "a prerequisite for the use" of the tape recordings at trial. *Ibid.* The question in this case is whether tapes that have been sealed, although not immediately, may be admitted into evidence at trial if the government shows that the integrity of the tapes has been maintained.[9] The district court held that, regardless of the

[9] Because the district court declined to make a finding as to the integrity of the Levittown tapes, the district court will have to make such a finding on remand if the government prevails in this Court. The district court, however, has already made a finding that there was no tampering with or alteration of the Vega Baja telephone tapes. Pet. App. 30a n.3, 45a.

integrity of the Levittown and Vega Baja tapes, they had to be suppressed solely because of the delay in sealing. The court of appeals held that those tapes had to be suppressed because the government's explanation for its failure to seal the tapes immediately was not satisfactory, and that suppression was required even if the tapes were conclusively shown to be unaltered.

1. Although both courts based their decisions on Section 2518(8)(a) of Title III, the statutory sealing provision, nothing in that provision requires suppression of evidence because of a delay in sealing. The statute provides that either a seal or a satisfactory explanation for its absence is a "prerequisite" for the use of tape-recorded electronic surveillance evidence at trial; however, the statute says nothing about the consequences of a delay in sealing. Under the statute's plain terms, a "satisfactory explanation" is a prerequisite for admission of the evidence only where the seal is absent; there is no such requirement where the seal is present but the actual sealing was delayed for some period after the termination of the interception.

The Second Circuit, in *United States* v. *Gigante,* 538 F.2d 502, 506 (1976), held that the requirement of a "satisfactory explanation" applies to a delay in sealing as well as to the absence of a seal. According to that court, the statutory reference to the absence of a seal must be interpreted to mean the absence of a seal affixed in a timely manner.

That construction of Section 2518(8)(a) is strained and implausible. Under the natural reading of the statute, the "absence" of the "seal provided for by this subsection" simply means the absence of a judicial seal, regardless of

when the seal was attached. If Congress had meant to include promptness in sealing as a prerequisite for admissibility, it could have done so explicitly, but it did not. Accordingly, if the seal is absent, then the tapes may not be used unless the government provides a satisfactory explanation for the seal's absence; if the seal is present, however, Section 2518(8)(a) poses no bar to admission of the evidence.[10]

In this case, the Levittown and Vega Baja tapes were sealed long before trial, and thus the statutory prerequisite was satisfied. Consequently, the exclusionary provision in Section 2518(8)(a) does not bar admission of those tapes at trial.

2. The structure of Title III rebuts any notion that Section 2518(8)(a) contains an implied suppression remedy for delays in sealing tape-recorded evidence. Congress drafted Title III in an effort to provide a statutory means for conducting electronic surveillance consistent with Fourth Amendment standards enunciated by the Court in *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v.

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[10] Nothing in the legislative history of Section 2518(8)(a) suggests that it was intended to apply to delays in sealing as well as the absence of a seal. The sealing provision was not the subject of much attention during the drafting of Title III, and the references to the statute in the legislative history tend to confirm that the exclusionary language in the statute was meant to apply only to cases in which there is no seal or satisfactory explanation for the absence of a seal. See S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968) ("the presence of the seal, noted above, is intended to be a prerequisite for use or disclosure • • • unless a satisfactory explanation can be made"). Senator Scott's contemporaneous explanation of Title III is consistent with that interpretation. See Scott, *Wiretapping and Organized Crime*, 14 How. L.J. 1, 25 (1968), *reprinted in* 114 Cong. Rec. 13,210 (1968) ("Unless under seal (or no satisfactory explanation of its absence) the information contained in such recording may not be used in any court or other proceeding.").

United States, 389 U.S. 347 (1967). See S. Rep. No. 1097, 90th Cong., 2d Sess. 27-28, 66-76 (1968). To enforce the privacy protections in the statute, Congress drafted a suppression remedy similar to the Fourth Amendment exclusionary rule. *Id.* at 96. Specifically, Section 2515 excludes intercepted conversations from evidence "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under Section 2515 are, in turn, enumerated in Section 2518(10)(a):

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

See *United States* v. *Donovan*, 429 U.S. 413, 432 (1977). This remedy extends only to those statutory provisions that protect privacy interests by limiting the use of electronic surveillance. *United States* v. *Donovan*, 429 U.S. at 435; see *id.* at 433-434 (quoting *United States* v. *Giordano*, 416 U.S. 505, 527 (1974) ("suppression is required only for a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device' ")).

Applying that principle, this Court has held that suppression is inappropriate for violations such as (1) misidentification of the authorizing Department of Justice official in the warrant application, *United States* v. *Chavez*, 416 U.S. 562, 570-580 (1974); (2) failure to list in the application every individual whose conversations the government expects to intercept, *Donovan*, 429 U.S. at 435-437; and (3) failure to inform the authorizing judge of all identi-

fiable persons whose conversations were intercepted. *Id.* at 438-439.

Like other post-interception procedures, the sealing requirement does not limit the conduct of electronic surveillance. Because it does not restrict the circumstances in which conversations can be seized, the sealing provision does not affect any interest protected by the Fourth Amendment.[11] A lack of compliance with a post-interception procedure does not mean that particular conversations were illegally seized. *Donovan,* 429 U.S. at 438. Therefore, lawfully intercepted tapes are not subject to suppression under 18 U.S.C. 2518(10) for a delay in sealing. See *United States* v. *Falcone,* 505 F.2d at 484.

The fact that Section 2518(10) does not authorize the exclusion of evidence for sealing delays sheds light on the proper construction of Section 2518(8)(a). It is most unlikely that Congress, having expressly defined the scope of the suppression remedy in Section 2518(10), intended to

[11] The court of appeals asserted that the government's delay in sealing the Vega Baja public telephone tapes demonstrated "an underlying cavalier conception that the sealing requirements are technical, rather than reflective of congressional concerns about underlying constitutional requirements." Pet. App. 14a. The length of the delay, however, resulted not from any "cavalier conception" of the sealing requirement, but simply from the failure to predict that the court would refuse to treat the subsequent authorizations for tapping the same phones as extensions of the original authorization (see pp. 9-10, *supra*). Moreover, the court's assumption that the sealing provision was imposed to satisfy some constitutional requirement is simply incorrect. Only the pre-intercept procedures implement the Fourth Amendment standards identified in *Berger* and *Katz*. Neither Congress nor any court other than the Second Circuit has ever suggested that there is a constitutional basis for the sealing requirement. Thus, even if the government erred in failing to seal immediately, the error did not deprive respondents of any constitutional right or any statutory right that was created to protect constitutional interests.

expand that remedy by implication in Section 2518(8)(a).[12] Interpreting Section 2518(8)(a) to require the suppression of unaltered tapes solely because of delays in sealing would 'inexplicably elevate[ ] the immediate sealing requirement to a more protected status than any of the other procedural requirements enacted in Title III." *United States* v. *Angelini,* 565 F.2d at 473 n.7.[13]

Contrary to the court of appeals' assertion (Pet. App. 6a), this interpretation does not "completely undercut the statutory purpose of protecting the integrity of the tapes." Under the Federal Rules of Evidence, the proponent of evidence always has the burden of establishing the authenticity of physical evidence offered for admission. See Fed. R. Evid. 901. Moreover, where questions have been raised as to the integrity of tape-recorded evidence, the courts of appeals have required the government to meet a strict standard of proof in establishing the authenticity of the tapes, quite apart from any requirement of Title III. See *United States* v. *Sandoval,* 709 F.2d 1553, 1554-1555

[12] In 18 U.S.C. 2518(8)(c), Congress provided an express remedy of contempt of court for any violation of Section 2518(8). It is unlikely that after creating an express remedy for all violations of that subsection, Congress intended to create by implication a different remedy for some violations of the same subsection.

[13] The suppression of tapes because of delays in sealing cannot be defended as an exercise of the court's supervisory powers. A court may not disregard the limits on a statutory or constitutional remedy simply by invoking supervisory power. See *United States* v. *Hasting,* 461 U.S. 499, 506 (1983); *United States* v. *Payner,* 447 U.S. 727, 734 (1980). Thus, the Second Circuit was wrong in *United States* v. *Massino,* 784 F.2d 153, 158-159 (1986), to invoke the supervisory power to establish an elaborate set of procedures and remedies for sealing delays, under which tape-recorded evidence must be suppressed in some instances simply because of the length of the delay, regardless of the reason for the delay or the strength of the showing that the tapes are unaltered.

(D.C. Cir. 1983); *United States* v. *Blakey*, 607 F.2d 779, 787 (7th Cir. 1979); *United States* v. *King*, 587 F.2d 956, 960-961 (9th Cir. 1978); *United States* v. *Biggins*, 551 F.2d 64, 66-68 (5th Cir. 1977); *United States* v. *Starks*, 515 F.2d 112 (3d Cir. 1975); *United States* v. *Knohl*, 379 F.2d 427, 440 (2d Cir.), cert. denied, 389 U.S. 973 (1967). It is therefore not necessary to torture the language of Section 2518(8)(a) to ensure that tape-recorded evidence is admitted only if it is shown to be genuine.

II. TAPE-RECORDED EVIDENCE SHOULD BE ADMISSIBLE IF THE COURT IS SATISFIED THAT THE EVIDENCE IS AUTHENTIC

Even if the "satisfactory explanation" requirement applies to delays in sealing (as well as the absence of a seal), suppression should be ordered only if the delay draws into question the integrity of the tape-recorded evidence. That is, a "satisfactory explanation" for a delay in sealing should be any explanation that satisfies the court that the delay did not result in tampering with the tapes. See, *e.g.*, *United States* v. *Lawson*, 545 F.2d 557, 564 (7th Cir. 1975) (although the government proffered an "untenable" reason for the delay, suppression was not ordered where the integrity of the tapes was safeguarded prior to sealing), cert. denied, 424 U.S. 927 (1976).

Most courts agree that, regardless of the reason for the delay, late-sealed tapes are admissible if the government shows that they have not been altered. See, *e.g.*, *United States* v. *Angelini*, 565 F.2d 469, 473 (7th Cir. 1977) (admitting tapes because the "Congressional purposes underlying the sealing requirement were met"), cert. denied, 435 U.S. 923 (1978); *United States* v. *Diadone*, 558 F.2d 775, 780 (5th Cir. 1977) (no suppression where no showing that "the integrity of the interceptions was in any way disturbed"),

cert. denied, 434 U.S. 1064 (1978); *United States* v. *Lawson*, 545 F.2d at 564 (no suppression despite 57-day delay where the integrity of the tapes is not questioned); *United States* v. *Cohen*, 530 F.2d 43, 46 (5th Cir.) (no suppression for five-week delay where "the parties stipulated to facts showing chain of custody and lack of alteration of the tapes"), cert. denied, 429 U.S. 855 (1976); *United States* v. *Sklaroff*, 506 F.2d 837, 840-841 (5th Cir.) (no suppression where the purpose of "safeguard[ing] the recordings from editing or alteration" is satisfied), cert. denied, 423 U.S. 874 (1975); *United States* v. *Falcone*, 505 F.2d 478, 484 (3d Cir. 1974) (admitting late-sealed tapes "where the trial court has found that the integrity of the tapes is pure"), cert. denied, 420 U.S. 955 (1975); *United States* v. *Vastola*, 670 F. Supp. 1244, 1282 (D.N.J. 1987) (suppression is not mandated where the "integrity of the tapes has not been questioned"). Cf. *McMillan* v. *United States*, 558 F.2d 877, 879 (8th Cir. 1977) (refusing to consider collateral attack alleging sealing delay since defendant did not challenge the integrity of the tapes). But see *United States* v. *Mora*, 821 F.2d 860, 867-868 (1st Cir. 1987) (although the court looks "first – and most searchingly – at whether the government has established by clear and convincing evidence that the integrity of the tapes has not been compromised," nevertheless "warranties of driven snow purity, proven beyond peradventure, will not suffice to constitute a 'satisfactory explanation' "); *United States* v. *Massino*, 784 F.2d 153, 158-159 (2d Cir. 1986) (suppression appropriate for delay in sealing regardless of the effect of the delay on the integrity of the tapes).

The principal purpose of Section 2518(8)(a) is to ensure the integrity of evidence obtained through electronic surveillance. See S. Rep. No. 1097, *supra*, at 104 ("Paragraph (8) sets out safeguards designed to insure that accurate records will be kept of intercepted communications."). In

addition to the sealing requirement, Section 2518(8)(a) requires that the contents of intercepted conversations be recorded, if possible; that the recording "be done in such way as will protect the recording from editing or other alterations"; that custody of the original tapes be maintained in a place that the court directs; and that the original tape recordings be preserved for at least ten years. The sealing requirement is therefore simply one of several devices Congress chose to ensure the integrity of evidence produced by electronic surveillance. See *United States* v. *Mora*, 821 F.2d 860, 867 (1st Cir. 1987); *United States* v. *Diana*, 605 F.2d 1307, 1314 (4th Cir. 1979), cert. denied, 444 U.S. 1102 (1980); *United States* v. *Lawson*, 545 F.2d 557, 564 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *United States* v. *Falcone*, 505 F.2d 478, 483 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).[14]

Because Section 2518(8)(a) creates an evidentiary rule designed to ensure the integrity of evidence, it would be perverse to order suppression in a case in which the tapes were shown to be authentic, simply because the procedures followed in that case might result in an increased risk of tampering in other cases. This Court has noted in other contexts that the suppression of relevant evidence "exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case." *United States* v. *Payner*, 447 U.S. 727, 734 (1980). For that reason, the Court has held that the drastic sanction of suppression ordinarily should not be

[14] The sealing provisions—and particularly Section 2518(8)(b)—serve the related subsidiary purpose of protecting information in the tapes from disclosure to unauthorized persons. S. Rep. No. 1097, *supra*, at 105. That purpose is fully accomplished by careful custodial procedures of the sort utilized by the FBI in this case. Pet. App. 30a-36a. There is no suggestion that the sealing delays led to any unauthorized disclosure in the instant case.

imposed in the absence of a violation of the defendant's own rights. *Id.* at 735-736. See also *United States* v. *Morrison*, 449 U.S. 361 (1981). To suppress evidence where there has been no violation of any right of the defendant, *i.e.*, where it is clear that the evidence at issue is untainted, would extend the evidentiary rule in Section 2518(8)(a) beyond the reach of both the Fourth Amendment exclusionary rule and the parallel statutory exclusionary rule in Section 2518(10)(a) of Title III.

For that reason, tape-recorded evidence should not be suppressed simply to deter future statutory violations. If, as we submit, a "satisfactory explanation" for a sealing delay is an explanation that gives the court confidence in the integrity of the tapes, it would be an extravagant application of exclusionary rule principles to suppress trustworthy evidence on the ground that admitting such evidence might encourage sealing delays in future cases.

Besides being inconsistent with general exclusionary rule principles, the cost of deterrence in this setting would far exceed any potential benefits. While sealing delays have occurred on occasion, there is no indication in court decisions or otherwise that the government routinely violates Section 2518(8)(a) or has used periods of delay for improper purposes. It would be inappropriate to create a rule excluding trustworthy evidence because of sealing delays when there is no evidence that the government has flouted Section 2518(8)(a) for the purpose of altering tapes.[15]

Finally, there is no need for deterrence in this setting. The reason is that the requirement that the government prove the tapes' authenticity already provides a substantial

[15] We are not aware of any case in which a court has found that federal prosecutors or agents have intentionally altered tape recordings of electronic surveillance.

deterrent to delay. The government is unlikely to delay sealing deliberately where the predictable result of such delay is precisely what happened here—a complex, lengthy hearing on the integrity of the tapes. Submitting tapes for judicial sealing is quick and easy. Thus, to the extent that that procedure obviates or simplifies any hearing on the tapes' authenticity, the government will have a great incentive to ensure that the tapes are sealed promptly.

The principal factor that led to the suppressions at issue here was the length of the delays involved.[16] But that factor should be irrelevant if the government shows that the integrity of the tapes was maintained throughout the period of the delay. Although a lengthy delay may increase the opportunities for alteration, the length of the delay loses it significance once the government satisfies the district court that no one took advantage of that opportunity and that the accuracy of the tapes was in fact preserved. Accordingly, even a lengthy delay should not require suppression as long as the tapes are unaltered.[17]

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[16] Although the court of appeals disavowed (Pet. App. 11a-12a) the district court's conclusion that suppression was required solely on the basis of the length of the delay, it nonetheless found the length of the delay highly significant. Thus, the court suppressed the Levittown tapes but suggested that the same mistake of law might constitute a satisfactory explanation for the delay in sealing the El Cortijo tapes (Pet. App. 13a) even though the only arguably relevant difference between the suppressed Levittown tapes and the admitted El Cortijo tapes is the length of the delays in sealing. See also *United States* v. *Kusek*, 844 F.2d 942, 946-947 (2d Cir. 1988) (refusing to suppress tapes when eight-day delay was due to prosecutor's misunderstanding of the statutory requirement); *United States* v. *Rodriguez*, 786 F.2d 472, 477 (2d Cir. 1986) (same, 14-day delay). In addition, the Levittown and the El Cortijo tapes were afforded identical protections against tampering, and samples of the Levittown tapes were included in those subjected to expert analysis and found to be unaltered. Pet. App. 45a; Gov't C. A. App. 161-162.

[17] The act of sealing provides, at best, only a modest degree of protection against tampering. Someone intent on tampering with the tapes can do so at any time prior to the expiration of the electronic surveillance order or its extensions, when the sealing obligation accrues. Because the seal hardly provides full protection against tampering, it is particularly perverse to impose a rigid suppression remedy in the case of anything more than a short delay in sealing following the expiration of the last extension order.

Because the purpose of the sealing requirement is to ensure the authenticity of tape-recorded evidence, suppression likewise should not be ordered simply because a court in a particular case does not regard the government's reason for failing to arrange for timely sealing as a good one. Whether the failure to seal immediately is due to negligence, oversight, or a misunderstanding of the statutory requirement, the authenticity of the intercepted conversations is not impaired as long as adequate measures have been taken to protect the tapes from unauthorized handling. The reason for the delay is relevant only if the conduct of the person responsible for sealing bears on the ultimate question whether the tapes accurately reflect the intercepted conversations, *e.g.*, if the government delayed in bad faith for the purpose of tampering with the tapes. In the absence of any such showing, a court should not predicate admissibility on its sympathy with the government's reason for the error.

III. THE TAPE-RECORDED EVIDENCE IN THIS CASE SHOULD BE ADMITTED EVEN IF SECTION 2518(8)(a) REQUIRES THE GOVERNMENT TO SHOW GOOD CAUSE FOR THE DELAY IN SEALING

Even if this Court construes Section 2518(8)(a) to require the government to provide a "satisfactory explanation" for the delay in sealing, and even if the Court concludes that a "satisfactory explanation" requires more than a showing that there was no bad faith or tape tampering,

the tapes in this case should not have been suppressed. Thus, even if Section 2518(8)(a) imposes the equivalent of a "good cause" standard, that standard was met in this case.

The reason for the sealing delays was that supervising attorney Frank Bove believed that sealing was not legally required until all the related interception orders and extensions for each target were completed. Neither delay was the result of procrastination on the part of the supervising attorney or a deliberate decision to ignore the sealing requirement. Rather, with respect to both the Levittown tapes and the Vega Baja public telephone tapes, Bove concluded that the authorizations for those interceptions were "extended," and that conclusion led him to postpone having the tapes sealed for several months while the surveillance of targets of the two series of intercept orders continued.

Whether or not attorney Bove reached the wrong conclusion as to the meaning of the sealing requirement in Section 2518(8)(a), his legal conclusion certainly constitues an adequate explanation for the delays and thus should not give rise to suppression.[18] Bove was aware of the sealing requirement and he fully intended to comply with it. J.A. 4-5, 24-28. Moreover, in light of the case law at the time, Bove's legal conclusions regarding the time for sealing the Levittown and Vega Baja tapes were reasonable, even though they may have been wrong.

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[18] We are not here challenging the decision of both lower courts that the El Cortijo surveillance was not an extension of the Levittown surveillance and that the March 1 Vega Baja telephone order was not an extension of the previous order. Accordingly, we accept for the sake of argument the district court's calculations of the sealing delays.

Section 2518(8)(a) imposes no sealing requirement until the expiration of the order authorizing electronic surveillance "or any extensions thereof." With respect to the Levittown tapes, the question Bove faced was whether the El Cortijo order was an "extension" of the Levittown order, thereby postponing the obligation to seal the Levittown tapes. In *United States* v. *Principie*, 531 F.2d 1132, 1142 & n. 14 (2d Cir. 1976), cert. denied, 430 U.S. 905 (1977), the Second Circuit construed the identical language in Section 2518(8)(d), which identifies the time at which the obligation to serve an inventory notice ripens.[19] In *Principie*, as in the instant case, the targets of the surveillance had changed locations to evade detection. The Second Circuit held that the order authorizing electronic surveillance at the second location was an "extension" of the order for the first location, which had the effect of postponing the commencement of the period for serving an inventory notice with respect to the conversations intercepted at the first location. Consequently, Bove's construction of the statutory language was similar to the Second Circuit's construction in *Principie*. In light of *Principie*, there was a legal basis for his view; even if that view was incorrect, it was not unreasonable. Accordingly, the Second Circuit's criticism (Pet. App. 12a) of Bove's interpretation of the statute (as resulting from "a disregard of the sensitive nature of the activities undertaken") is both unfair and misguided. At worst, Bove made an "honest mistake." See *United States* v. *Mora*, 821 F.2d at 869. Under any standard, Bove's legal error should constitute a "satisfactory explanation" for the delay in sealing the Levittown tapes.

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[19] An inventory notice must be served "not later than ninety days after * * * the termination of the period of an order or extensions thereof." 18 U.S.C. 2518(8)(d).

The argument against suppression is even more compelling with respect to the Vega Baja public telephone tapes. Both courts below agreed that the March 1, 1985, order was an "extension" of the earlier order, which expired on February 17, because it covered the "same telephones, concerned the same crimes, and targeted the same individuals as the initial order." See Pet. App. 82a-83a, citing *United States* v. *Vazquez*, 605 F.2d 1269, 1278 (2d Cir. cert. denied, 444 U.S. 981 (1979). See also Pet. App. 13a-14a. But the courts held that the government had failed to give a satisfactory explanation for the 12-day delay in obtaining the extension. Yet, Title III does not require the government to explain the hiatus between the expiration of an order and the authorization of an extension, and it is unclear why a second intercept order should be considered an "extension" if the government has a satisfactory explanation for a brief hiatus following the first order, but not an "extension" if the explanation is deemed unsatisfactory. Certainly, Bove cannot be faulted for failing to anticipate that the Second Circuit would find the difficulties in revising the Title III affidavit to be an insufficient justification for the delay in obtaining an extension order, thereby retroactively triggering the sealing requirement.

The court of appeals' criticism of the government's conduct in this case is difficult to justify where, in an earlier decision, the court required no explanation for a 23-day hiatus between the expiration of an order and the subsequent extension. See *United States* v. *Scafidi*, 564 F.2d 633, 641 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978). The court in *Scafidi* rejected an argument that conversations intercepted pursuant to the initial order should have been sealed when that order expired, holding that sealing was required "only at the conclusion of the whole surveillance." *Ibid.* The reason for the different result in this case is difficult to ascertain. Instead of applying

Scafidi, the court of appeals affirmed the suppression order in this case because the revision of the affidavit could have been completed more "expeditiously," and it characterized the government's lack of speed as demonstrating "an underlying cavalier conception" of the sealing requirements. Pet. App. 14a. In fact, however, the 12-day hiatus in the Vega Baja interception occurred because the Office of Enforcement Operations within the Department of Justice was attempting to revise the lengthy affidavit that was being used to apply for authorizations and extensions. Pet. App. 79a-80a. That hiatus was thus attributable not to carelessness or indolence on Bove's part, but to the close scrutiny that Title III applications receive within the Department of Justice. The Department's deliberateness serves a two-fold purpose: it curtails needless invasions of privacy and prevents the later suppression of the evidentiary fruits of the surveillance. These purposes should be encouraged, not discouraged. Cf. *United States* v. *MacDonald*, 456 U.S. 1, 11 n.12 (1982) (the decision to seek an indictment should be considered carefully and delay resulting from the care given to this matter "is certainly not any indication of bad faith or deliberate delay"); *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966) (no constitutional requirement that an arrest be effected as soon as law enforcement officials have probable cause). And, of course, the 12-day delay in approving the application for extension of the Vega Baja public telephone wiretaps does not reflect in any way upon the government's subsquent efforts to comply with the immediate sealing requirement.

In sum, the Second Circuit has suppressed evidence in this case (1) in the absence of a finding that the tapes have been altered, (2) in the absence of any constitutional violation, and (3) in the absence of bad faith on the part of the government. Suppression of evidence under those circum-

stances finds no support in the text or the policies underlying Title III.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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